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# IN THE COURT OF APPEALS OF INDIANA

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| THOMAS M. DIXON, | ) | |
| | ) | |
| Appellant-Respondent, | ) | |
| | ) | |
| vs. | ) | No. 71A04-0810-CV-592 |
| | ) | |
| MARIA CECILIA LUCERO, | ) | |
| | ) | |
| Appellee-Petitioner | ) | |

APPEAL FROM THE ST. JOSEPH CIRCUIT COURT
The Honorable Michael G. Gotsch, Judge
The Honorable David T. Ready, Magistrate
Cause No. 71C01-0211-DR-787

**March 9, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Thomas M. Dixon appeals the modification of child support for the three children Dixon had with his ex-wife Maria Cecilia Lucero. We restate Dixon's four issues as:

1. Whether the court should have considered the contents of Dixon's Requests to Admit when determining the findings; and

2. Whether the court abused its discretion in denying Dixon's motion to correct error.

We affirm.

## FACTS AND PROCEDURAL HISTORY

The marriage between Dixon and Lucero produced three children. Lucero filed for dissolution on November 27, 2002. On January 27, 2003, the court dissolved the marriage after the parties entered an agreement regarding child custody, child support, and property division. On March 12, 2004, the parties modified child support by a joint agreement, which was approved by the court. Again on February 8, 2005, the parties filed a Stipulation of Mutual Support Obligations, which the court approved.

On April 4, 2007, Lucero petitioned for modification of support. On May 25, 2007, Dixon filed a cross-petition for modification of support. On May 30, 2007, Dixon moved for sanctions against Lucero and her counsel and for judgment in his favor, based on their alleged failure to cooperate with discovery. After two hearings regarding the pending motions, the court entered a child support order that found:

> 1. The parties[']  oldest child, [D.,] is a full-time student at the University of Notre Dame, residing on campus for the school year. [D.] resides with the Respondent/father, Thomas Dixon[,] for the 19 weeks he is not living on campus. No overnight credit is given to Petitioner/mother. The Court has not considered the issue of tuition and room and board inasmuch as the parties have a separate agreement regarding the same.

2. The parties will continue to enjoy shared, joint physical custody of the parties[’] other two minor children, [S.] and [C.], in accordance with their agreement approved by the Court and incorporated into the January 27, 2003 Decree of Dissolution. However, the Court is required to exercise its discretion to designate one party as being the party for controlled expenses. The Court so designates the Petitioner/mother Maria Cecilia Lucero for that purpose. The joint physical custody operates prospectively and contemplates an equal number of overnights for each party. The fact that one party might actually have a few more overnights than the other does not disturb the joint physical custody order.

3. The Court does find that the Respondent is voluntarily underemployed. The Petitioner alleges that Respondent is underemployed as a result of his voluntarily resigning his position as an Elkhart County Deputy Prosecutor. The Court finds that Respondent, having married a lady residing in Traverse City, Michigan had legitimate reasons to discontinue his Elkhart County employment and that resignation cannot be the basis of a finding of voluntary underemployment.

However, that finding is not entirely,[sic] dispositive of the issue. If a party has earnings or income which is substantially less than their [sic] obvious earning capacity, the Court may impute additional income to that party.

In this case the Respondent/father Thomas Dixon,[sic] has submitted Child Support Obligation Worksheets reflecting that his income for 2006 was $741.50 per week and Respondent contends that is the figure which the Court must use to calculate child support. However, Respondent Dixon also submitted a Statement of Attorney Fees which shows that his attorney fee rate is $175.00 per hour. The Court will assume that 50% of Respondent’s gross income goes to overhead. Therefore, to net the $38,558.00 figure which the Respondent espouses, he would have to generate income of $77,116.00. At Respondent’s billable rate that computes to 440.66 hours of billable time. Assuming,[sic] Respondent works for 49 out of the 52 weeks a year, he would only have to work 8.99 hours per week to achieve the income level which he urges the Court to use in computing the parties[’] respective support obligations. Even assuming that 20% of Respondent’s billings are uncollectible, he would only have to work and bill 11.24 hours per week to reach his stated income level.

Respondent is an experienced, capable attorney of 12 or more years of active law practice. Billing less than twelve hours a week at his current billable rate constitutes a voluntary underemployment. Therefore, in calculating child support the Court has attributed income to the Respondent of $1,000.00 per week. Assuming the 20% uncollectible and 50% overhead, the imputed amount would only require Respondent to bill

> something less than 15 hours per week at his current billable rate. Therefore, the Court has found that for purposes of calculating the child support in this matter, the Respondent is voluntarily underemployed.

(Appellant's App. at 10-12.) Using that information and child support worksheets, the Court determined Lucero should pay child support of $51.87 per week.

Dixon filed a motion to correct error alleging: the court decreased Lucero's child support for D. before D. moved away to college; the court erred in finding Dixon voluntarily underemployed; the court erred in finding the younger two children had equivalent overnights each year with Dixon and Lucero; the court erred when designating Lucero the payer of controlled costs; and the court abused its discretion by not awarding him attorney fees or by not imposing some other sanction on Lucero or her counsel. Lucero responded to his motion, and the court held a hearing. It then granted Dixon's motion as to the amount of support Lucero owed for D., but denied his motion in all other respects.

## DISCUSSION AND DECISION

1. Dixon's Requests to Admit

Dixon served Lucero with Requests to Admit on April 27, 2007. Lucero's response was due by May 28, 2007. Lucero served her response on Dixon at the hearing on May 31, 2007. On appeal Dixon asserts the court erroneously decided numerous factual issues that should have been conclusively resolved by Lucero's failure to timely respond to his Requests to Admit.

Requests for admission are controlled by Ind. Trial Rule 36(A), which provides in pertinent part:

> A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26(B) set forth in the request, including the genuineness of any documents described in the request. . . .
>
> Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless, within a period designated in the request, not less than thirty [30] days after service thereof or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney. . . .

"Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission." T.R. 36(B).

In accordance therewith, Lucero's failure to respond to Dixon's Requests to Admit within thirty days caused "those matters to be admitted and conclusively established by operation of law." *Corby v. Swank*, 670 N.E.2d 1322, 1324 (Ind. Ct. App. 1996) (quoting *Henrichs v. Pivarnik*, 588 N.E.2d 537, 543 (Ind. Ct. App. 1992)). As such, Dixon did not need to prove those facts at trial. *See id.*

Nevertheless, as Lucero asserts, "the conclusiveness of a fact deemed admitted under T.R. 36 'does not mean that the fact is automatically admitted into evidence.'" *Kerkhof v. Kerkhof*, 703 N.E.2d 1108, 1111 (Ind. Ct. App. 1998) (quoting *Ind. Civil Rights Comm'n v. Wellington Village*, 594 N.E.2d 518, 528), (Ind. Ct. App. 1992), *trans. denied), reh'g denied.* "'An admission may be offered into evidence at the hearing where the facts established in that admission are not subject to dispute, but the admissibility of the facts may be challenged.'" *Id.* Accordingly, the trial court could not consider Lucero's admissions based on Dixon's requests unless those requests were offered and admitted into evidence. They were not. (*See* Petitioner's Exhibits 1 through 5; *see also*

Respondent's Exhibits A through K.)

In his Reply Brief, Dixon asserts his Requests to Admit "were offered into evidence by Lucero's attorney at the hearing on May 31, 2007, over Dixon's objection." (Reply Br. at 1) (citing Appellant's App. at 23). That page of the Appellant's Appendix contains page 21 of the transcript of the hearing on May 31, 2007. Therein, Lucero's counsel is discussing his request for fees, which is based in part on Dixon's "45 admissions, clearly without a scintilla of relevance . . . ." (Tr. at 21.) Counsel requests permission to approach the bench, so he "can give [the judge] a copy of Mr. Dixon's . . . request for admissions . . . ." (*Id.*) However, Lucero's counsel did not offer that document into evidence as an exhibit.[1]

Dixon also supports his assertion that the Requests were admitted into evidence with a citation to page 9 of the Appellee's Appendix, which contains page 102 of the May 31, 2007 transcript. At this point in the hearing, Lucero's counsel is cross-examining Dixon and asking whether a petition to modify custody was pending. Dixon replies, "There is not . . . [b]ecause the Judge is ruling on the request to admit." (Tr. at 102.) That statement by Dixon does not demonstrate the court was, in fact, considering the admissibility of the document at issue. Nor does it demonstrate Dixon had at some other point in the proceeding offered the document into evidence so the judge could consider its admissibility.

Because Dixon has not demonstrated the Requests to Admit were admitted into evidence at the hearing, we cannot find the court erred by failing to rely on Lucero's

[1] Neither do we find an objection by Dixon to the admission of that document.

alleged admissions. Neither will we consider those alleged admissions on appeal, as they were not part of the record before the trial court.

2. Denial of Motion to Correct Error

Dixon also appeals the portions of his motion to correct error that were denied by the trial court. We review the denial of a motion to correct error for an abuse of discretion. *In re A.T.*, 889 N.E.2d 365, 367 (Ind. Ct. App. 2008). A trial court abuses its discretion when its decision is against the logic and effect of the facts and circumstances before the court, or when the court has misinterpreted the law. *Id.*

Dixon asserts the court should have granted additional portions of his motion to correct error because the court's findings were either unsupported by the record or improper as a matter of law. Therefore, to review whether the court abused its discretion by denying the motion to correct error, we must review the underlying judgment.

The trial court entered findings of fact and conclusions of law without a request from either party. In such situations, the findings control only those issues they cover, while a general judgment standard applies to any issue about which the court made no finding. *Harris v. Harris*, 800 N.E.2d 930, 934 (Ind. Ct. App. 2003), *trans. denied* 812 N.E.2d 798 (Ind. 2004). "[A] general judgment may be affirmed on any theory supported by the evidence presented at trial." *Scoleri v. Scoleri*, 766 N.E.2d 1211, 1215 (Ind. Ct. App. 2002). Where there are findings, we must insure the evidence supports those findings and the findings support the judgment. *Id.* Findings are clearly erroneous when the record lacks probative evidence, or reasonable inferences therefrom, to support the findings. *Id.* As we conduct our review, we consider only the evidence and inferences

favorable to the judgment, and we may not reweigh the evidence or assess the credibility of the witnesses. *Id.*

A. Voluntary Underemployment

Dixon argues the "court erred in entertaining an inquiry as to whether or not Dixon is voluntarily under-employed . . . [b]ecause there is no evidence that Dixon has ever neglected any of his support obligations." (Appellant's Br. at 13.) We reject Dixon's premise. When calculating child support, the court first must determine the income of each party. *See* Ind. Child Support Guideline 3; *see also* Ind. Child Support Obligation Worksheet (Line 1 requests each parent's Weekly Gross Income). Dixon directs us to nothing in the Guidelines that suggests a court may not undertake such an inquiry unless the parent has a delinquent child support arrearage. We decline Dixon's invitation to create such a requirement.

Dixon also asserts the evidence does not support the finding he was voluntarily underemployed. Child support orders "cannot be used to 'force parents to work to their full economic potential or make their career decisions based strictly upon the size of potential paychecks.'" *Miller v. Sugden*, 849 N.E.2d 758, 761 (Ind. Ct. App. 2006) (quoting *In re E.M.P.*, 722 N.E.2d 349, 350-51 (Ind. Ct. App. 2000)), *trans. denied sub nom. Miller v. Miller*, 860 N.E.2d 596 (Ind. 2006). Nevertheless:

> When a parent has some history of working and is capable of entering the work force, but voluntarily fails or refuses to be employed in a capacity in keeping with his or her capabilities, such a parent's potential income should be determined to be a part of the gross income of that parent. The amount to be attributed as potential income in such a case would be the amount that the evidence demonstrates he or she was capable of earning in the past.

Child Supp. G. 3, cmt. 2(c)(2).

When a parent is voluntarily unemployed or underemployed, child support shall be determined based on potential income. Ind. Child Support Guideline 3(A)(3). "A determination of potential income shall be made by determining employment potential and probable earnings level based on the obligor's work history, occupational qualifications, prevailing job opportunities, and earning levels in the community." *Id.* The purposes behind determining potential income are to "discourage a parent from taking a lower paying job to avoid the payment of significant support" and to "fairly allocate the support obligation when one parent remarries and, because of the income of the new spouse, chooses not to be employed." Child Supp. G. 3 cmt. 2(c). Trial courts have broad discretion when imputing income "to ensure the child support obligor does not evade his or her support obligation." *Miller*, 849 N.E.2d at 761.

Dixon does not challenge the court's computation of his potential income. Rather he devotes three pages to arguing the court discriminated against him on the basis of gender: "One is hard pressed to imagine any Indiana court ruling as this court did if Dixon were female and Lucero were the male." (Appellant's Br. at 15.) Again, we reject Dixon's premise.

When the court entered that order in February of 2008, the three children of this marriage were aged 19, 13, and 9. The oldest lives on a college campus nine months a year, while the youngest two attend public school in the district where Dixon lives. We acknowledge Dixon's desire to be available to care for his children full-time, rather than putting them in childcare. However, in light of their ages, we cannot say the trial court

abused its discretion by suggesting he could work four additional hours each week. Neither has he convinced us his gender influenced the court's suggestion that a parent of three children of these ages work fifteen hours per week.

Based on the unchallenged findings, the court did not abuse its discretion in finding Dixon voluntarily underemployed. *See Bojrab v. Bojrab*, 810 N.E.2d 1008, 1015 (Ind. 2004) ("While legitimate reasons may exist for a parent to leave one position and take a lower paying position other than to avoid child support obligations, this is a matter entrusted to the trial court and will be reversed only for an abuse of discretion."). We accordingly find no error in the denial of Dixon's motion to correct error as to this issue.

B. Overnights

When computing child support for the two youngest children of the marriage, the court assigned equal parenting time to Dixon and Lucero after finding:

> The parties will continue to enjoy shared, joint physical custody of the parties[']' other two minor children . . . in accordance with their agreement approved by the Court and incorporated into the January 27, 2003 Decree of Dissolution. . . . The joint physical custody operates prospectively and contemplates an equal number of overnights for each party. The fact that one party might actually have a few more overnights than the other does not disturb the joint physical custody order.

(Appellant's App. at 11.)

Dixon asserts: "The uncontroverted evidence shows that, dating back at least to 2004, Dixon has had more than 184 overnights with all the children annually. . . . Dixon testified under oath to these facts. Lucero did not offer any evidence to the contrary, or call Dixon's credibility into question." (Appellant's Br. at 17.) Dixon provided no citations to the record to support those specific factual assertions, and we will not

undertake the burden of searching the record for him.[2] *See Leone v. Keesling*, 858 N.E.2d 1009, 1013 (Ind. Ct. App. 2006) ("we will not search the record to find a basis for a party's argument") (quoting *Young v. Butts*, 685 N.E.2d 147, 151 (Ind. Ct. App. 1997)), *trans. denied* 869 N.E.2d 456 (Ind. 2007).

Because Dixon has not demonstrated the court abused its discretion, we affirm the denial of the motion to correct error as to the court's assignment of equal parenting time to Dixon and Lucero.

C. Controlled Expenses

Dixon next asserts the court erred in designating Lucero the payer of "controlled expenses." "Controlled expenses" are not defined in the Child Support Guidelines, but the term appears in the Online Child Support Calculator at the Indiana Courts Website. In the three-step Online Practitioners' Calculator, the first page requests General Information. *See* https://secure.in.gov/judiciary/childsupport/calculator/support.pl (last visited Feb. 12, 2009). That information includes the number of Annual Overnights spent with each parent.

If, and only if, both parents spend 181-183 nights with the children, a new question appears at the bottom of the General Information page. That new question requires a determination which parent pays the "Controlled Expenses." Clicking on the "controlled expenses" link leads to the following information:

[2] Dixon Does cite his Requests to Admit. (*See id.* at 18) (citing App. at 123 and 128). As explained above, those Requests were not admitted into evidence at trial, and accordingly we may not consider them as evidence on appeal. Neither does Dixon's Reply Brief argument on this issue offer citations to the record to support his factual assertions.

> The parent with whom the child has a permanent place of residence bears the burden of paying controlled expenses. Examples of controlled expenses may include school books and supplies, out-of-pocket healthcare expenses, and the like. You need only designate one parent as the payer of controlled expenses when parenting time is equally shared between both parents. When one parent has more parenting time than the other, that parent is automatically designated as the payer of controlled expenses based on the Child Support Guidelines.

In other words, when two parents have joint custody and share parenting time equally, the court must designate one parent as the nominal "custodial parent" for purposes of calculating child support.

From this we discern the trial court was to use its broad discretion to determine whether Dixon or Lucero, who spend an equal number of nights with their two younger children each year, should nominally be designated the custodial parent or payer of controlled expenses. The court chose Lucero, and explained at the hearing on Dixon's motion to correct error that it did so because Lucero pays a greater percentage of the child support obligation.

Dixon claims the court erred because the children have more overnights with him, the children go to school in the school district where Dixon lives, and Dixon pays the school fees. As we discussed above, Dixon has not demonstrated the court erred when it determined the children would have an equal number of overnights with each parent. Accordingly, we decline to reverse on that ground. Neither does Dixon explain the import of where the children go to school, as that does not appear to be one of the facts used to define controlled expenses.

Dixon did testify their agreement required him to "cover school and book fees and supplies for the boys while in grade and high school." (Tr. at 80; *see also* Appellant's App. at 85.) That agreement also required Dixon to pay for the boys' clothing, while Lucero and Dixon would split equally "all necessary unreimbursed medical, dental and vision expenses." (Appellant's App. at 85, 86.)

However, that child support agreement from 2005 no longer controls the parties' obligations regarding support. Rather, their obligations are controlled by the new support order.

As the court designated Lucero payer of the controlled expenses, she should be paying for school fees and supplies (including books), clothing, and the unreimbursed medical expenses noted on the court's Child Support Obligation Worksheet. As Lucero is expected to carry both the burden and the financial benefit of being designated payer of controlled expenses, we cannot find the court abused its discretion in selecting Lucero as the nominal custodial parent.

D. Request for Sanctions

Dixon claims the court abused its discretion in denying his request for sanctions against Lucero and her counsel, Fred Hains. Dixon does not offer a legal basis for sanctioning Lucero or Hains.[3] The two decisions he cites − *Burkhart v. Burkhart*, 349 N.E.2d 707 (Ind. Ct. App. 1976), and *Johnson v. Johnson*, 389 N.E.2d 719 (Ind. Ct. App. 1979) − address the court's discretion to assess attorney fees against one party. However,

[3] Neither does Dixon's motion to correct error assert a statute or rule under which he alleged the trial court erred.

Dixon seeks sanctions, not attorney fees. By failing to cite authority in support of his position, he has waived this argument for appeal. *See* Ind. App. R. 46(A)(8)(a) (contentions must be supported by citations to the authorities, statutes, and parts of the record relied on). Waiver notwithstanding, Dixon has not demonstrated the court erred.

Dixon claims "Lucero's decision to continue to pursue this matter was frivolous and harassing." (Appellant's Br. at 24.) To support that claim, however, he cites only the Requests to Admit that are not before us. As explained above, he has not cited facts that could demonstrate error.

As for Hains, Dixon cited some of Hains' representations to the court during the hearing, claiming those representations were inaccurate and painted Dixon in a negative light. At the hearing on Dixon's motion to correct error, the court made the following comment regarding this issue:

> Well, all I can say is: There's been enough ill will and strife in this case, and that's why [you] ended up in the high-conflict classes.
>
> I asked the parties to go to Dr. Rupley. The parties had previously been to mediation with Charlie Asher, I believe. I asked the parties to go to Dr. Rupley, and I got a report back from Dr. Rupley. I asked for comments on the report.
>
> And I think you agreed to the recommendation -- or Petitioner agreed to the recommendation of Dr. Rupley.
>
> And from Mr. Dixon, what I got from you was about a five-page tirade of all the things that are wrong with Mr. Hains, wrong with your wife, wrong with Dr. Rupley. And since it was addressed to me, I assume it didn't include me; but the next one may.

(Tr. at 160-161.) This indicates the court found Dixon at least as responsible as Hains and Lucero for the contentious nature of the proceedings. The court was in the best position to assess responsibility, and we decline to second-guess its decision.

Affirmed.

BRADFORD, J., and FRIEDLANDER, J., concur.